Supreme Court, U.S.
FILED
SEP 24 2015
OFFICE OF THE CLERK

14-940

IN THE

Supreme Court of the United States

SUE EVENWEL, *et al.*,

Appellants,

—v.—

GREG ABBOTT, In His Official Capacity As Governor of Texas, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF TEXAS AS *AMICI CURIAE*, IN SUPPORT OF APPELLEES

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INTERESTS OF *AMICI CURIAE*[1]

The American Civil Liberties Union Foundation (ACLU) is a nationwide, non-profit, non-partisan organization with approximately 500,000 members dedicated to the principles of liberty and equality enshrined in the Constitution and our nation's civil rights laws. In support of those principles, the ACLU has appeared before this Court in numerous cases involving electoral democracy, including *Reynolds v. Sims*, 377 U.S. 533 (1964). The ACLU of Texas is a statewide affiliate of the national ACLU.

STATEMENT OF THE CASE

In 2013, the Texas Legislature, relying on 2010 Census data, adopted a redistricting plan (Plan S172) that apportioned the legislative seats of the Texas Senate so that each Senatorial District would contain substantially the same number of people. Plaintiffs-Appellants Sue Evenwel and Edward Pfenninger brought suit against the Texas Governor and Secretary of State in their official capacities, alleging that under Plan S172, the Senatorial Districts in which they reside contained more eligible or registered voters than other districts in violation of the Equal Protection Clause. Jurisdictional Statement Appendix ("J.S. App.") 18a. The case was

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to the filing of *amicus* briefs are on file with the Clerk's office.

assigned to a three-judge district court pursuant to 28 U.S.C. § 2284(a), and Defendants-Appellees moved to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

The district court granted the motion. It recognized that the Plaintiffs have "rel[ied] upon a theory never before accepted by the Supreme Court or any circuit court: that the metric of apportionment employed by Texas (total population) results in an unconstitutional apportionment because it does not achieve equality as measured by Plaintiffs' chosen metric—voter population." J.S. App. 9a. Relying principally on *Burns v. Richardson*, 384 U.S. 73 (1966), the district court explained that "a state's choice of apportionment base is not restrained beyond the requirement that it not involve an unconstitutional inclusion or exclusion of a protected group." J.S. App. 10a. It thus concluded that Texas's use of total population for apportionment purposes, in order to equalize the total number of inhabitants within each State Senate District, did not violate the Equal Protection Clause. J.S. App. 13a. Plaintiffs appealed directly to this Court, 28 U.S.C. § 1253, which noted probable jurisdiction. 135 S. Ct. 2349 (2015) (mem.).

SUMMARY OF ARGUMENT

The only question that this Court needs to answer to resolve this appeal is this: Should the Equal Protection Clause be read to prohibit States from apportioning their state legislatures on the basis of total population? The answer is no.

Every State was admitted into this Union on the condition that, within each State, a republican form of government "should be substantially maintained," Federalist No. 43 at 271 (James Madison) (Clinton Rossiter ed., 1961); *cf.* U.S. Const. art. IV, § 4, and since the framing of the United States Constitution, apportionment based on total population has been considered an acceptable way to put republican principles into effect. One republican principle embraced by the Founders was universal and equal representation, a principle consistent with their belief that a legitimate government derives its powers from all of the people. Declaration of Independence para. 2 (U.S. 1776). And one way of reflecting this principle was to count all persons for purposes of representation, and to apportion them equally with respect to the House of Representatives. Nothing suggests that the republican principle of universal and equal representation animating the design of the House of Representatives was limited to the federal government, and thus nothing suggests that States cannot also reflect these republican principles by modelling their apportionment systems after the House. And nothing about the later passage of the Equal Protection Clause, whose protections extend to all people, should be read to preclude this straightforward application of republican principles on behalf of all people living within the borders of a State. For these reasons, this Court should affirm the judgment below.

ARGUMENT

I. STATES HAVE AN OBLIGATION TO MAINTAIN A REPUBLICAN FORM OF GOVERNMENT.

The United States was "founded on republican principles," Federalist No. 43 at 271 (James Madison) (Clinton Rossiter ed., 1961), and the States have an obligation in our constitutional scheme to maintain a republican system of government. As James Madison explained in Federalist No. 43, "In a confederacy founded on republican principles, and composed of republican members, . . . the [members have a] right to insist that the forms of government under which the compact was entered into should be *substantially* maintained." *Id.* The express text of the Constitution provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government," U.S. Const. art. IV, § 4, but the Guarantee Clause also necessarily recognizes the power of the States to maintain a republican system of government for themselves. *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991).[2]

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[2] This guarantee is also enforceable by Congress, and sometimes by the courts in appropriate cases. *See* U.S. Const. art. IV, § 4; *Luther v. Borden*, 48 U.S. 1, 42 (1849) (enforcing republican guarantee "rests with Congress"); U.S. Const. art. III, § 1; *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2660 n.3 (2015) (citing *New York v. United States*, 505 U.S. 144, 185 (1992) ("perhaps not all claims under the Guarantee Clause present nonjusticiable political questions")). These multiple layers of enforcement demonstrate the importance that the Framers attached to a republican form of government. For that very reason, it would be paradoxical to

The Framers generally agreed that the fundamental principles of republicanism included a government created by the people, and a government that represented all the people. Thus, in Federalist No. 39, Madison described a republican government as one "which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior." Federalist No. 39 at 237. Charles Pinckney, a delegate to the Constitutional Convention, similarly described a republic as one in which "the people at large, either collectively or by representation, form the legislature." 4 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 328 (2d ed. 1861) (hereafter "Elliot's Debates") (Pinckney) (South Carolina ratifying convention). In sum, a republican government is one "in which the scheme of representation takes place," and involves "the delegation of the government . . . to a small number of citizens elected by the rest . . . ." Federalist No. 10 at 76 (Madison).

The Constitution does not purport to prescribe the exact type of republican government each State is obliged to have, so long as States apply these basic principles. "Whenever the States may choose to substitute other republican forms, they have a right to do so and to claim the federal guaranty for the latter. The only restriction imposed on them is that

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suggest that the Constitution precludes the States from taking steps to ensure that neither Congress nor the courts will need to step in to enforce this guarantee.

they shall not exchange republican for anti-republican Constitutions . . . ." Federalist No. 43 at 272 (Madison); *see also* 2 Elliot's Debates 168 (Stillman) (Massachusetts ratifying convention) ("each state shall choose such republican form of government as they please"); *cf. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015) ("it is characteristic of our federal system that States retain autonomy to establish their own governmental processes"). And of course, to the Framers, one of the great virtues of the new government proposed by the Constitution was that it was very much a republic, even while it sought to accommodate the sovereignty of the many States. *See generally* Federalist No. 10 (Madison).

II. APPORTIONMENT BASED ON TOTAL POPULATION IS A LEGITIMATE WAY TO IMPLEMENT THE REPUBLICAN PRINCIPLE OF UNIVERSAL AND EQUAL REPRESENTATION.

The form of republican government that the Framers adopted for the United States incorporated an apportionment system based on total population. As discussed below, this system reflected the widely-accepted republican principle of universal and equal representation. This principle is in no way uniquely applicable to the Federal Government. It is also a principle that finds expression in the Petition Clause of the First Amendment. Thus, states should not be precluded from choosing to follow the example of our Founders as they seek to maintain a republican form of government for themselves.

A. The Apportionment Clause Counted All "Persons" for Purposes of Representation in the House of Representatives.

The Apportionment Clause provides that congressional representatives "shall be apportioned among the several States . . . according to their respective Numbers," which was based on "the whole Number of free Persons . . . ." U.S. Const. art. I, § 2.[3]

The Framers were well aware that "Persons" included those whom the States had excluded from the franchise. Federalist No. 54 at 335-36 (Madison) ("It is a principle of the proposed Constitution that as the aggregate number of representatives allotted to the several States is to be determined by a federal rule founded on the aggregate number of inhabitants, . . . [while] [i]n every State, a certain proportion of inhabitants are deprived of this right [of suffrage] by the constitution of the State, who will be included in the census by which the federal Constitution apportions the representatives."); Federalist No. 57 at 351 (Madison) ("each representative of the United States will be elected by five or six thousand citizens" only, notwithstanding apportionment of 30,000 per representative).[4] Indeed, they could have easily

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[3] Of course, in condoning the Three-Fifths Compromise, the Framers departed from those principles in a way that history has rightly condemned and the post-Civil War Amendments corrected.

[4] As delegates from the different States, they knew, for instance, that women could not vote in any State (except in New Jersey), *see* Alexander Keyssar, *The Right to Vote* 306 n.1 (rev. ed. 2009), and that certain people who could not meet certain

based apportionment on the number of "Electors," a term that appears in the clause immediately preceding the Apportionment Clause. *See* U.S. Const. art. I, § 2, cl. 1 ("the Electors in each State shall have Qualifications requisite for Electors of the most numerous Branch of the State Legislature"). They did not do so.

Total population apportionment for the House of Representatives reflected the Framers' belief that all people are entitled to representation in a republican form of government. While the design of the Senate and the Electoral College largely reflected the fact that our republic was a federation of independent sovereigns, *see infra* Part II.B., the

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property or taxpaying prerequisites also could not vote (except in Vermont), *see id.* at 306-07. They were aware that "Persons" included children, who could not vote.

They were aware that "Persons" would include newly-arrived, interstate migrants ineligible to vote under several states' lengthy durational residency laws. *See id.* (six months to two years residency requirements); *cf.* Federalist No. 43 at 273 (Madison) (referencing "the accession of alien residents, of a casual concourse of adventurers, or . . those whom the constitution of the state has not admitted to the rights of suffrage"). And they were aware that "Persons" could include non-citizens, since they expressly provided Congress the power to "establish a uniform Rule of Naturalization," U.S. Const. art. I, § 8, and elsewhere referred specifically to "natural born Citizen[s]" and "Citizen[s] of the United States at the time of the Adoption of this Constitution," U.S. Const. art. II, § 1. *See also Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (the word "person" includes noncitizens). Yet they declined to base apportionment only upon citizens, naturalized or otherwise.

The Framers thus ensured that all people were counted for purposes of representation, regardless of suffrage status.

value underlying the design of the House of Representatives was the thoroughly republican principle of universal and equal representation, as expressed by total population apportionment. *See* 1 Elliot's Debates 76 (John Adams, arguing for representation based on population during the debates over the Articles of Confederation, noting, "we stand here as the representatives of the people; that in some states the people are many, in others they are few; that therefore their vote here should be proportioned to the numbers from whom it comes. . . . [T]he interests within doors should be the mathematical representatives of the interests without doors."); 3 Elliot's Debates 111 (Corbin) (Virginia ratifying convention) ("Do they wish persons to be represented? Here . . . they are indulged; for the number of representatives is determined by the number of people . . . .").

The Framers understood that universal representation and total population apportionment could help ensure that the personal and unalienable rights of all people, not just voters, would be protected. As James Madison put it in Federalist No. 54, "It is not contended that the number of people in each State ought not to be the standard for regulating the proportion of those who are to represent the people of each State. . . . [T]he rule is understood to refer to the personal rights of the people, with which it has a natural and universal connection." Federalist No. 54 at 333; *see also* 5 Elliot's Debates 309 (Wilson) (Constitutional Convention) ("The cultivation and improvement of the human mind was the most noble object. With respect to this object, as well as to other *personal* rights, numbers were surely the natural and precise

measure of Representation."). After all, governments that "deriv[e] their just powers from the consent of the governed" must be designed to secure the unalienable and personal rights of life, liberty, and the pursuit of happiness for all, not just voters. Declaration of Independence para. 2 (U.S. 1776).

For other statesmen, population apportionment also reflected the republican belief that no one who contributes to society, e.g., through taxes, should be excluded from representation, regardless of voting status. *See Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 563-64 (1895); U.S. Const. art. I, § 2 ("Representatives *and direct Taxes* shall be apportioned among the several States . . . according to their respective Numbers . . . .") (emphasis added); 2 Elliot's Debates 36 (King) (Massachusetts ratifying convention) ("It is a principle of this Constitution, that representation and taxation should go hand in hand."). This, too, was tied to the idea that the government must take care to represent all those who fall under its care. 3 Elliot's Debates 320 (Henry) (Virginia ratifying convention) ("a thorough acquaintance with the condition of the people is necessary to a just distribution of taxes"). And Founding-Era statesmen were aware that the taxpaying population included those that could not vote. *See, e.g.*, "Brutus," *Essay VI* (Dec. 27, 1787), reprinted in *The Anti-Federalist Papers* 293, 297-98 (Ralph Ketcham ed., 1986) (taxation "reaches every person in the community in every conceivable circumstance," including women as

they go about their daily lives). That certainly holds true today.[5]

Walking hand-in-hand with the principle of universal representation is the idea that representation should be equal. Rather than a mere "byproduct" of the Constitution, Appellants' Br. at 17, 39, the principle of representational equality was embraced by Founding-Era statesmen and was reflected straightforwardly by assigning every representative the same number of people, whether voting or not. *See, e.g.*, 3 Elliot's Debates 111 (Corbin) (Virginia ratifying convention) ("That thirty thousand shall have one representative, no matter where. If this be not equal representation, what, in the name of God, is equal representation?"); 2 Elliot's Debates 90 (Parsons) (Massachusetts ratifying convention) ("Under this Constitution, an equal representation, immediately from the people, is introduced"); 3 Elliot's Debates 644 (Johnson) (Virginia ratifying convention) ("As to the principle of

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[5] Opposing *amici* suggest, relying heavily on Federalist No. 54, that the primary purpose of tying both representation and taxation to numbers was to ensure accurate census-taking. Br. of Cato Inst. & Reason Found. as *Amici Curiae* Supporting Appellants ("Cato Br.") at 11-12. This gets things backwards. The purpose of the census was to help effectuate population apportionment, not the other way around. *See Utah v. Evans*, 536 U.S. 452, 475 (2002). While census accuracy was certainly a "salutary" byproduct of tying both representation and taxation to numbers, this secondary benefit was discussed at the end of Federalist No. 54, *see* Federalist No. 54 at 338, after Madison's half-hearted defense of the Three-Fifths Compromise. It was at the beginning of Federalist No. 54, right out of the gate, that Madison defended population apportionment on republican principles. *See id.* at 333.

representation, I find it attended to in this government in the fullest manner. It is founded on absolute equality.").[6]

The principle of equal representation followed naturally from the notion that the persons from whom consent is necessary for legitimate government were "created equal." Declaration of Independence para. 2. If too many constituents were assigned to any one representative, it would dilute constituent access and impair that representative's ability to understand the concerns of every part of their community. *See, e.g.*, "John DeWitt," *Essay III* (Nov. 5, 1787), reprinted in *The Anti-Federalist Papers* 329, 334 ("Have you a right to send more than one for every thirty thousand of you? Can he be presumed knowing to your different, peculiar situations . . . ? Or is there any possibility of giving him information?").[7] (And as discussed *infra* Part II.C.,

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[6] Some opponents worried that the apportionment provision was too vague (i.e., "[t]he Number of Representatives *shall not exceed* one for every thirty Thousand," U.S. Const. art. I, § 2 (emphasis added)), and would result in unequal representation by allowing different States to choose different ratios (e.g., one for every 50,000), *see, e.g.*, Patrick Henry, *Speech of June 5, 1788*, reprinted in *The Anti-Federalist Papers* 199, 202-203; while supporters rushed to assure that this would not happen since no State would willingly reduce the number of representatives sent to Congress by adopting a 50,000 to one ratio, *see, e.g.*, 2 Elliot's Debates 271 (Harrison) (New York ratifying convention). But either way, both supporters and opponents of the Constitution agreed on the republican premise that representation should be equal.

[7] Though these concerns were primarily expressed as a critique that the number of constituents assigned per representative (30,000) was too high, such concerns would obviously be

non-voting populations were considered to be constituents that could present their concerns to their legislators.) While the size of congressional districts has grown with the growth in population, the underlying principle of equal representation remains fully applicable today. *See Gaffney v. Cummings*, 412 U.S. 772, 779 (1973) ("'Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives.'" (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969))).

Thus, the notion that non-voting populations could be counted for purposes of representation has long been considered a valid application of core republican principles.

B. The Republican Principle of Universal and Equal Representation is Neither Limited to the House of Representatives Nor Driven by Federalist Concerns.

Appellants and opposing *amici* acknowledge, as they must, that the Framers provided for equal apportionment for the House of Representatives on the basis of total population. Appellants' Br. at 42; Br. of Cato Inst. & Reason Found. as *Amici Curiae* Supporting Appellants ("Cato Br.") at 4-5. But they argue that it would be inappropriate for the States to model their apportionment system after the House of

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relevant if anyone had suggested that some representatives should have more constituents than another.

Representatives. Appellants' Br. at 42-44; Cato Br. at 4-14.

In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court rejected Alabama's attempt to model its apportionment system after the United States Senate, because the Senate's design of assigning each State the same number of votes regardless of their size was premised on the federalist notion of state sovereignty. *See id.* at 574. Because "[p]olitical subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities," *id.* at 575, it made no sense for Alabama to adopt the United States Senate model when apportioning for its state legislature.

Similarly, opposing *amici* argue, the decision to adopt total population apportionment for the House was a cold calculation driven by federalism considerations. They argue that if an elector-based system had been adopted instead, it would have supposedly created a "perverse incentive" for States to enfranchise as many people as possible so as to maximize the number of their representatives in the Federal Government, thereby creating a "race to the bottom." Cato Br. at 7-9. Appellants, for their part, also rely on *Gray v. Sanders*, 372 U.S. 368 (1963), where this Court rejected a State's attempt to model their state legislative system after the United States Electoral College. Appellants' Br. at 43; *see also* Cato Br. at 10-11.

Madison's own writings directly refute these arguments. He expressly drew a distinction between the republican principles underlying the House of Representatives and the federalist, state-sovereignty

principles underlying the Senate and, in part, the Electoral College. In other words, the total population apportionment system of the House of Representatives was *not* premised on federalist notions such as state sovereignty. More importantly, he expressly observed that *both the House of Representatives and the State legislatures* were animated by the *same* republican principles. He wrote:

> In order to ascertain the real character of the government, it may be considered in relation to . . . the sources from which its ordinary powers are to be drawn . . . . The House of Representatives will derive its powers from the people of America; and the people will be represented in the same proportion and on the same principle as they are in the legislature of a particular State. . . . The Senate, on the other hand, will derive its powers from the States as political and coequal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress. . . . The executive power will be derived from a very compound source.[8]

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[8] The Electoral College derived its powers from a "compound source" because it distributed votes based on the numbers of House of Representatives *and* Senate members from each State. *See* U.S. Const. art. II, § 1, cl. 2. It was further premised on state sovereignty principles by effectively allowing each State only one vote when no one presidential candidate received a

Federalist No. 39 at 239-40.

If the States and the House of Representatives are both essentially animated by the same republican principles, surely States should now be permitted to model their apportionment systems after the House.[9] The impropriety of States' modelling their systems after those that are

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majority of votes, and by placing the choice of Vice President in the hands of the Senate under certain similar circumstances. *See* U.S. Const. art. II, § 1, cl. 3. These federalist features remained largely in place even after the system was modified by the Twelfth Amendment. *See* U.S. Const. amend. XII.

[9] While several early States apportioned their legislatures on a basis falling short of total population (e.g., by apportioning based on all "taxable inhabitants"), this simply demonstrates that the Framers may have also accepted other apportionment systems as being consistent with republican principles, in addition, of course, to the system prescribed for the House of Representatives. It is also worth noting that several of these States also rejected apportionment on the basis of elector status. *See, e.g.*, Pa. Const. of 1776, §§ 6, 17 (apportioning based on "taxable inhabitant" while limiting suffrage to certain "freemen"); Mass. Const. of 1780, pt. 1, ch. 1, § III, arts. II, IV (apportioning based on "ratable polls" while limiting suffrage to certain "male person[s]"); Vt. Const. of 1786, ch. I, § IX; ch. II, § VII (apportioning based on "taxable inhabitants" while limiting suffrage to "freemen"); Tenn. Const. of 1796, art. I, § 2; art. III, § 1 (apportioning based on "taxable Inhabitants" while setting residency and property qualifications for electors).

Only one State with a written constitution at the time of the founding used an apportionment system based on elector status, *see* N.Y. Const. of 1777, art. V, which Appellants erroneously argue should now be required for all States.

premised on state sovereignty, like the Senate and Electoral College, is simply inapplicable here.[10]

Given this clear distinction, it is unsurprising that Appellants and opposing *amici* do not point to any Founding-Era sources, or any part of the Constitution itself, which suggests that federalism concerns animated the principle of universal and equal representation as reflected in the House of Representatives. To the contrary, when the Framers described the importance of governments representing all people, they did not suggest that that ideal was driven by federalist principles.

For example, James Wilson, later a Supreme Court Justice, argued during the Constitutional Convention that the government "ought to possess" the "*mind or sense*[] of the people at large," and argued that "[t]he Legislature ought to be the most exact transcript of the whole society." 5 Elliot's Debates 160. George Mason similarly asserted at the Constitutional Convention that representatives "ought to know and sympathize with every part of the community," implored the Framers to "attend to the rights of every class of the people," 5 Elliot's Debates 136, and argued that "representatives should sympathize with their constituents; should

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[10] In *Gray*, this Court explained that it was improper to model a state legislature after the Electoral College system because the College was based on a "collegiate principle" that the "election of the President [should not] be left to the people," 372 U.S. at 378, 376 n.8, an elitist concept which this Court observed as "belong[ing] to a bygone day," *id.* at 376 n.8. The republican principle of universal and equal representation, on the other hand, remains important today.

think as they think, and feel as they feel," 5 Elliot's Debates 161. *Cf.* 5 Elliot's Debates 258 (Hamilton) (Constitutional Convention) ("as states are a collection of individual men, which ought we to respect most, the rights of the people composing them, or of the artificial beings resulting from the composition? Nothing could be more preposterous or absurd than to sacrifice the former to the latter."). "The system of representation in the two Houses of the Federal Congress . . . is one conceived out of compromise and concession indispensable for the establishment of our federal republic." *Reynolds*, 377 U.S. at 574. But the *values* underlying the House of Representatives are thoroughly republican in nature and accessible to the States.

Lastly, none of the Founding-Era sources cited by opposing *amici* actually suggest that population apportionment was adopted because of any fear of over-enfranchisement by the States, much less suggest that expanding the franchise was in and of itself anathema to a republic. The remarks by Madison that are cited by opposing *amici* reveal nothing more than a desire to allow States to remain in control of determining elector qualifications. *See, e.g.*, Cato Br. at 7 ("'[i]t is a fundamental principle of the proposed Constitution, that as the aggregate number of representatives allotted to the several States is to be determined by a federal rule founded on the aggregate number of inhabitants, so the right of choosing this allotted number in each State is to be exercised by such part of the inhabitants as the State itself may designate.'" (quoting Federalist No. 54)).

The values of universal and equal representation are not federalism values; they are

broader republican values that *both* the Federal and State governments embrace. *See* Federalist No. 43 at 271 (Madison). Far from reflecting a federalist scheme or a desire to minimize enfranchisement, the Apportionment Clause was based on total population in order to vindicate a basic republican principle of universal and equal representation. Accordingly, it is neither constitutionally anomalous nor constitutionally impermissible for a State to use the apportionment system for the House of Representatives as a model of republican governance.

C. The Framers' Commitment to Representation for All People, Including Non-Voters, Finds Further Expression in the Petition Clause.

By protecting the right of the people to petition the government for the redress of grievances, U.S. Const. amend. I, the First Amendment also reflects the Framers' commitment to the republican principle that all people governed by a legislature—and not only voters—are constituents who deserve a voice and representation.

"The very idea of a government, republican in form, implies a right . . . to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *United States v. Cruikshank*, 92 U.S. 542, 552 (1875); *see also Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011) (petitioning allows people "to express their ideas, hopes, and concerns to their government and their elected representatives"). As this Court has recently surveyed in detail, the right to petition is "of ancient significance in the English law and the Anglo-American legal tradition" dating back to the

Magna Carta. *See generally id.* at 2498-2500. In England, the Petition of Right of 1628 was issued by Parliament to the Crown, and "occupies a place in English constitutional history superseded in importance, perhaps, only by Magna Carta itself and the Declaration of Right of 1689." *Id.* at 2499. These values carried over to America, and "[a]s of 1781, seven state constitutions protected citizens' right to apply or petition for redress of grievances . . . ." *Id.* at 2503 (Scalia, J., concurring in part and dissenting in part) (citation omitted).

If a republican form of government guaranteed representation only to eligible voters, then one might reasonably expect the right to petition to be similarly limited. But, in fact, the right to petition has been exercised by non-enfranchised populations throughout this nation's history, including in petitions seeking to obtain the franchise in the first place. *See Guarnieri*, 131 S. Ct. at 2499-2500 ("Petitions allowed participation in democratic governance even by groups excluded from the franchise. For instance, petitions by women seeking the vote had a role in the early woman's suffrage movement." (citation omitted)); *see also, e.g., Cruz v. Beto*, 405 U.S. 319, 321 (1972) ("persons in prison," which necessarily includes felons who may not be allowed to vote, "like other individuals, have the right to petition the Government for redress of grievances"). Even in the colonial era, petitions were filed by "women, blacks (whether free or slave), Native Americans, and, perhaps, even children." Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 Fordham L. Rev. 2153, 2182 (1998); *see id.* at 2183-87; *see also* Stephen A. Higginson, *A Short History of*

the Right to Petition Government for the Redress of Grievances, 96 Yale L.J. 142, 153 (1986) ("Not only the enfranchised population, but also unrepresented groups—notably women, felons, Indians, and, in some cases, slaves—represented themselves and voiced grievances through petitions.").

The Framers understood firsthand the importance of allowing the right to petition for non-enfranchised populations, for they themselves relied heavily on the right to petition in the pre-Revolutionary Era when they could not vote in Parliamentary elections. *See* 1 Elliot's Debates 42-49 (first congress of colonial delegates) (recounting several petitions from the colonists to the King in the pre-Revolutionary era). Indeed, the fact that they could not meaningfully exercise their petition right was a major contributing factor to the Declaration of Independence, which complained, "In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only be repeated injury." Declaration of Independence para. 30; *see Guarnieri*, 131 S. Ct. at 2499. It was thus all the more important that, under the new republic, the right to petition be meaningful especially for non-voting populations.

As Founding-Era statesmen recognized, a republic does not live by the carrot-and-stick of elections alone, but on constant feedback and interaction between the representatives and their

constituents.[11] Meaningful access for all was deemed critical for ensuring that representatives would be truly representative, i.e., familiar with the needs of all parts of their community. *See, e.g.*, 2 Elliot's Debates 13 (Heath) (Massachusetts ratifying convention) ("The representative is one who appears in behalf of, and acts for, others; he ought, therefore, to be fully acquainted with the feelings, circumstances, and interests of the persons whom he represents; and this is learnt among them, not at a distant court."). This included being familiar with the needs of non-voting populations.

Daniel Dulany, in a famous pre-Revolutionary pamphlet, argued that the British Parliament could not impose taxes upon Americans—not because Americans did not have the right to vote in Parliamentary elections, but because Americans had no meaningful opportunity to convey their concerns to Parliament. *See* Daniel Dulany, *Considerations on the Propriety of Imposing Taxes in the British*

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[11] Madison, for instance, recognized that suffrage laws, while critical in a republican form of government, also had the potential to distort true representation:

> The qualifications of electors and elected were fundamental articles in a republican government . . . If the legislature could regulate those of either, . [a] republic may be converted into an aristocracy or oligarchy, as well by limiting the number . authorized to elect. Qualifications founded on artificial distinctions may be devised by the stronger in order to keep out partisans of a weaker faction.

5 Elliot's Debates 404 (Constitutional Convention); *see also Oregon v. Mitchell*, 400 U.S. 112, 210 (1970) (Harlan, J., concurring in part and dissenting in part).

Colonies, for the Purpose of Raising a Revenue, by Act of Parliament 8-9 (2d ed. 1765). Dulany pointed out that in medieval England, even women, who did not have the right to vote, actually consulted with lawmakers before taxes were imposed on them. *See id.* at 9 ("But, that the Reader may perceive how strictly the Principle of no Persons being Taxed without their Consent, hath been regarded, it is proper to take Notice, that, upon the same Occasion, Writs were likewise directed even to Women . . . to send their Deputies to consult, and consent to what should be judged necessary . . . "). Similarly, Madison expressly referred to non-voting populations as "constituents" in his writings. *See* Federalist No. 56 at 347 (referring to the 28,670 "constituents" assigned per representative in Britain, similar to the 30,000-to-1 ratio proposed).

In sum, the legitimacy of any government depends on the consent of all of the people, not just voters. *See* Declaration of Independence para. 2. That non-voters in particular are entitled to petition their government is simply another reflection of the fact that elected officials are responsible for representing all people. While many elected officials undoubtedly pay more attention to constituents who are able to vote, for better or for worse, that reality should not preclude a State from assigning to each of its elected representatives the same number of constituents, whether or not they vote.

III. THE EQUAL PROTECTION CLAUSE DID NOT DISPLACE THE REPUBLICAN PRINCIPLE OF UNIVERSAL AND EQUAL REPRESENTATION.

Appellants and opposing *amici* principally argue that the Equal Protection Clause should now be interpreted to require all States to apportion their legislative districts on the basis of elector status so that each district contains roughly the same number of eligible voters. The Equal Protection Clause has certainly outlawed certain past practices that were once apparently considered to be consistent with republican principles, such as poll taxes. *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668-69 (1966) (poll taxes unconstitutional under Equal Protection Clause); *id.* at 684 ("Property qualifications and poll taxes have been a traditional part of our political structure." (Harlan, J., dissenting)). Notions of equality are often more expansive than past generations have realized. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

However, nothing about the text or passage of the Fourteenth Amendment suggests that the preexisting republican principle of equal representation for all people was displaced. *See* Appellees' Br. at 39-41. To the contrary, the same amendment that introduced the Equal Protection Clause reaffirmed that apportionment by total population (now perfected with the elimination of the Three-Fifths Compromise) remained a legitimate way to make a republican system of government work. U.S. Const. amend. XIV, § 2. And though the specific question presented by this appeal was not squarely addressed in *Reynolds*, the fact that this

Court has readily gestured towards the importance of both representational equality and electoral equality in the same breath further suggests that there is nothing inherent in the Equal Protection Clause that has forcefully displaced the longstanding republican principle of universal and equal representation. *See, e.g.*, *Reynolds*, 377 U.S. at 562 ("Legislators *represent people*, not trees or acres. Legislators are *elected by voters*, not farms or cities or economic interests." (emphases added)); *see also Burns v. Richardson*, 384 U.S. 73, 91-92 (1966).

Where the Founders had the wisdom to build certain basic principles of equality into the government that they created, the equality guarantees of the Equal Protection Clause should not be read to *prohibit* States from adopting those very principles of equality.[12]

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[12] Once this Court resolves the question of whether States should be permitted to adopt a total population apportionment system, it need not address either of the two questions that the City of Yakima, Washington, urges this Court to answer—questions that Yakima asserts will purportedly impact a case pending before the Ninth Circuit where Yakima had been found to violate Section 2 of the Voting Rights Act, and in which the ACLU serves as opposing counsel. *See* Br. of Yakima, Wash. as *Amicus Curiae* Supporting Appellants ("Yakima Br."). Yakima first asks this Court to address whether an apportionment system based on total population must also "strive to equalize the [citizen voting-age population ("CVAP")] among each district insofar as possible," Yakima Br. at 4, in disregard of the government's interest in remedying violations of Section 2 of the Voting Rights Act. Appellants, however, have not meaningfully raised this question and have instead asked this Court to rule that total population apportionment systems are "*per se* unconstitutional." Appellants' Br. at 44. Nor was the

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"The genius of republican liberty seems to demand . . . not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people." Federalist No. 37 at 223 (Madison). States that seek to give life to these principles by counting all people for purposes of representation act "in full harmony with the Constitution's conception of the people as the font of governmental power." *Ariz. State Legislature*, 135 S. Ct. at 2674. They embrace their constitutional duty to embrace republican principles. U.S. Const. art. IV, § 4. And although Appellants accuse these States of violating the Equal Protection Clause, if anything, these States are helping to vindicate its guarantees to *all* persons who seek to participate in our democracy.

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challenged Texas redistricting plan, Plan S172, a response to a Section 2 violation. Second, Yakima asks this Court to prohibit single-member districts under vague hypothetical circumstances, *e.g.*, Yakima Br. at 22 (whether to prohibit single-member districts when all "unnecessary CVAP imbalance" is eliminated but "unavoidable CVAP imbalance" exists to "an extreme degree"), none of which are alleged to exist here. Indeed, Appellants do not challenge the propriety of single-member districts under any circumstance.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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Dated: September 24, 2015